No. 76-1867

Supreme Court, U. S.
FILED
JUN 27 1977
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1976

BERNHARD ROSEE,

Plaintiff-Petitioner,

vs.

BOARD OF TRADE OF THE CITY OF CHICAGO, an Illinois corporation, SIDNEY C. HAMPER, MARTIN H. MILEK, ROY C. LOFTUS, RICHARD ROSE, RAYMOND COMENZO and THOMAS HERR, individually and as members of the Committee of Arbitration of the Board of Trade of the City of Chicago; JULIUS MAYER, WILBERT E. HUGE, ROBERT L. DAVID, THOMAS E. HOSTY, ROBERT C. LIEBENOW, individually and as President of the Board of Trade of the City of Chicago; WARREN W. LEBECK, individually and as Secretary of the Board of Trade of the City of Chicago; JAMES J. COUGHLIN; ALBERT W. KIRBY and SAM GORDON,

Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS AND THE SUPREME COURT OF ILLINOIS

WILLIAM J. HARTE, LTD.
111 West Washington Street
Chicago, Illinois 60602
Attorney for Plaintiff-Petitioner

The Scheffer Press, Inc.—(312) 263-6850

TABLE OF CONTENTS

PAGE

Opinion Below 2

Jurisdiction 2

Questions Presented for Review 2

Constitutional Provision Involved 3

Statement of the Case 3

Finding by the Trial Judge 15

Finding of the Appellate Court 16

Argument 18

I.

The Appellate Court's Decision Denied Petitioner Due Process Of Law By Holding That Issues Decided By The Arbitration Committee Were Conclusively Resolved And Were Not Subject To Contrary Determination By The Trial Court 18

II.

Petitioner Was Denied Due Process Of Law By The Appellate Court's Substitution Of Its Findings Of Fact For Those Of The Trial Judge 29

Conclusion 30

LIST OF AUTHORITIES

Arnold v. United Air Lines, 296 F. (2) 191, 193, C.A. 7 27

Baisky v. Board of Regents of N. Y., 347 U.S. 442, 469 28

Barrows v. Jackson, 346 U.S. 249 28

Baxter v. Board of Trade, 83 Ill. 146, 149 23

	PAGE
Board of Trade v. Johnson, 264 U.S. 1	22
Board of Trade v. Nelson, 162 Ill. 431, 439; 44 N.E. 743, 745	23
Bostedo v. Board of Trade, 227 Ill. 90, 91, 81 N.E. 42, 43	23
Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673, 680	28
Chas. Wolff Packing Co. v. Court of Indust. Relations, 262 U.S. 522, 544	25
Cocalis v. Nazlides, 309 Ill. 152, 139 N.E. 95, 98	25
Deakton v. L. D. Schreiber & Co., 479 F.2d 529 (7th Cir. 1973)	21
Dorchy v. Kansas, 264 U.S. 286	25
Doud v. Hodge, 350 U.S. 485	28
Edward v. Capital Air Lines, 176 F. (2) 755, 760, 761; App. D.C. cert. den. 338 U.S. 855	27
Ellerd v. Southern Pac. R. Co., 241 F. (2) 541, 544, C.A. 7	27
Fisher v. Board of Trade, 80 Ill. 85, 87	23
Gonzales v. Roman Catholic Archbishop, 280 U.S. 1, 16, 17	24
Hill v. Mercury Record Corp., 26 Ill. App. 350, 361; 168 N.E. (2) 461, 466	24
Horan v. Blowitz, 13 Ill. 2d 126, 148 N.E. 2d 495, 499 (1958)	29
Mengel v. Nashville etc. Union, 221 F. (2) 644, 647, C.A. 6	25
Pacaud v. White, 218 Ill. 138, 147, 148; 75 N.E. 779-782	23
Phillips Petroleum Co. v. Jenkins, 297 U.S. 629	28

	PAGE
People ex rel. v. Board of Trade, 80 Ill. 134, 137	23
People ex rel. Page v. Board of Trade, 45 Ill. 112, 116, 118	23
Pitcher v. Board of Trade, 121 Ill. 412, 419, 421; 13 N.E. 187-189	23
Re Murchison, 349 U.S. 133, 136	22
Re Smith, 381 Pa. 223, 230; 112 Atl. (2) 625	25
Ricci v. Chicago Mercantile Exchange, 409 U.S. 289 (1973)	20
Ryan v. Cudahy, 157 Ill. 108, 119 (1895)	20
Shelley v. Kraemer, 334 U.S. 1	28
Silver v. New York Stock Exchange, 373 U.S. 341 (1963)	20
Steele v. L. & N. R. Co., 323 U.S. 210, 213	26
Sturges v. Board of Trade, 86 Ill. 441, 442	23
Trax v. Raich, 239 U.S. 33, 38	28
Weaver v. Fisher, 110 Ill. 152, 153	22
Yick Wo v. Hopkins, 118 U.S. 356	29

STATUTES AND OTHER AUTHORITIES

Fourteenth Amendment of the United States Constitution	3
The Commodity Exchange Act [title 7, sec. 1 *et seq.* U.S.C.]	11
Legislative Act to Incorporate the Board of Trade, Section 7, adopted by Illinois Legislature in 1859	18
28 U.S.C. 1254	2
28 U.S.C. 1343	23
42 U.S.C. 1983	23
6A Corbin on Contracts (1962)	25

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No.

BERNHARD ROSEE,

Plaintiff-Petitioner,

vs.

BOARD OF TRADE OF THE CITY OF CHICAGO, an Illinois corporation, SIDNEY C. HAMPER, MARTIN H. MILEK, ROY C. LOFTUS, RICHARD ROSE, RAYMOND COMENZO and THOMAS HERR, individually and as members of the Committee of Arbitration of the Board of Trade of the City of Chicago; JULIUS MAYER, WILBERT E. HUGE, ROBERT L. DAVID, THOMAS E. HOSTY, ROBERT C. LIEBENOW, individually and as President of the Board of Trade of the City of Chicago; WARREN W. LEBECK, individually and as Secretary of the Board of Trade of the City of Chicago; JAMES J. COUGHLIN; ALBERT W. KIRBY and SAM GORDON,

Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS AND THE SUPREME COURT OF ILLINOIS

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the Appellate Court of Illinois in this case.

OPINION BELOW

The Opinion of the Appellate Court of Illinois is reproduced in Appendix "A" *infra.* This Opinion is reported at 43 Ill.App.3d 203. Leave to appeal the decision of the Appellate Court was denied by the Supreme Court of Illinois on January 28, 1977.

JURISDICTION

The order of the Supreme Court of Illinois denying leave to appeal from the Appellate Court of Illinois was entered January 28, 1977. The jurisdiction of this Court is involved pursuant to 28 U.S.C. Sec. 1254. Leave was granted by this Court on April 19, 1977, extending the time for filing the instant Petition to and including June 27, 1977.

QUESTIONS PRESENTED FOR REVIEW

1. May a member of the Board of Trade of the City of Chicago, an association which has virtual total economic life and death control over commodity trading, who has been compelled to arbitrate a dispute or suffer the loss of valuable property rights, and who thereafter engages in a mandatory arbitration proceeding which fails to provide fundamental procedural safeguards and rights, be precluded, consistent with the Due Process Clause of the Fourteenth Amendment, from litigating in a court of competent jurisdiction those issues determined in the course of such arbitration proceeding.

2. Consistent with the Due Process Clause of the Fourteenth Amendment, may a person who has been compelled to arbitrate a dispute or suffer the loss of valuable property rights, and who therefore engages in such mandatory arbitration, be precluded from litigating his claims in a court of competent jurisdiction by virtue of the fact that he has engaged in arbitration.

3. Where, in the course of trial, substantial evidence is introduced supporting the claims of a party and on the basis of such evidence the trial judge, sitting without a jury, makes findings of fact and renders judgment in favor of said party, may an appellate tribunal, consistent with the Due Process Clause of the Fourteenth Amendment, substitute contrary findings of fact based upon the same evidence and set aside the decision of the trial court.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment of the Constitution of the United States provides in pertinent part as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In 1963, petitioner commenced this action in the Circuit Court of Cook County, Illinois, against, *inter alia,* the Board of Trade of the City of Chicago (hereafter, "the Board" or "the Board of Trade"), various Board members (individually and as members of the Board's Committee of Arbitration), James E. Baggot, Jr., and Donald Morrison (individually and d/b/a Baggot and Morrison) and Harris Haywood, the managing employee of the firm of Baggot and Morrison. Petitioner, who had been a member of the Board of Trade from 1944 until the occurrence of the events which formed the basis for this action and who had traded through the firm of Baggot and Morrison from 1958 through part of the year 1960, sought damages

for conspiracy, fraud, misrepresentation, defamation, malicious interference with occupation and breach of a fiduciary relationship. The case was ultimately tried in the Circuit Court of Cook County before Judge Nathan Cohen, sitting without a jury, and he entered judgment in favor of plaintiff and against the defendants, James E. Baggot, Jr. (hereafter "Baggot"), Donald W. Morrison (hereafter "Morrison"), and Harris Haywood (hereafter "Haywood"), jointly and severally, in the sum of $399,139.42 in compensatory damages. He also awarded plaintiff exemplary damages of $150,000 against Morrison and $150,000 against Haywood. The remaining defendants, the Board of Trade of the City of Chicago, its officers and members of its Committee of Arbitration (hereafter referred to collectively as "The Board of Trade defendants") were dismissed at the conclusion of the plaintiff's case.

The defendants Baggot, Morrison and Haywood appealed from the said judgments against them, and plaintiff cross-appealed from the judgment in favor of the Board of Trade defendants.

The Appellate Court, in a lengthy opinion set forth in Appendix "A" to this Petition, reversed the judgment in favor of plaintiff and remanded the cause to the trial court with directions to enter judgment in favor of the defendants Baggot, Morrison and Haywood. The Court also affirmed the judgment in favor of the Board of Trade defendants. The Supreme Court of Illinois subsequently denied petitioner leave to appeal.

Before describing further the nature of this case, a brief outline of the circumstances which preceded the litigation is advised. This case represents the nineteen-year fight of one man, Bernhard Rosee, against almost

invincible opposition in an effort to prove that he is an honest man who has been injured in his reputation and income to a degree seldom experienced by anyone. Bernhard Rosee has been a trader in commodities since 1925, and until the occurrences set forth herein, had been a member of the Board of Trade of the City of Chicago since 1944. The cast of characters in these proceedings fall into three categories; (1) the Board of Trade of the City of Chicago and certain of its members and officers; (2) James E. Baggot, Jr. and Donald W. Morrison, doing business in partnership form as Baggot and Morrison, together with Harris Haywood, the managing employee of Baggot and Morrison; and (3) certain agents and employees of the Commodity Exchange Authority.

During the period of time in which he was a member of the Board of Trade of the City of Chicago, Bernhard Rosee had from time to time voiced complaints against certain of the defendants. Among the persons of whom Rosee had been critical were certain of the persons described above as being members or officers of the Board of Trade of the City of Chicago. Some of Rosee's complaints resulted in the conviction of certain of these persons for violation of the Commodity Exchange Act. (In fact, respondent Baggot was recently charged in a criminal information with such violations and entered a plea of guilty within the past week.) The members criticized and their confederates had long engaged in activities having as their end depriving Rosee of his membership on the Board of Trade. By so doing, they hoped to silence his criticisms, or at least render them ineffective.

Rosee began to trade through Baggot and Morrison in the year 1958. Throughout the year 1959 and during part of the year 1960, Baggot and Morrison systematically

cheated and defrauded Rosee in his trades. In so doing, Baggot and Morrison used a large variety of devices, the most frequent of which was Baggot and Morrison's recording a large number of unprofitable trades as being trades of Rosee. During this period, Rosee was extremely trusting. This trust was fortified by the false and manipulated records furnished him by Baggot and Morrison.

After indulging in the above machinations for some time, Baggot and Morrison unjustifiably and unauthorizedly closed out Rosee's account on November 9, 1959, and informed him that his account contained no money, even though Baggot and Morrison owed Rosee $20,000.00 on that date. The close out resulted in a substantial loss to Rosee of some $24,000.00. Rosee protested this action, stating that the books of Baggot and Morrison were false and requested from them the original records relating to his trades. They were not produced; despite promises over the years by various of the defendants, they never have been.

Subsequently, on June 3, 1960, Morrison filed a complaint with the Board of Trade under its Rule 130, asserting that Rosee owed Baggot and Morrison some $27,308.82 and, therefore, that one-half the amount ($13,654.41) was owed to him. Having no choice under the mandatory arbitration provisions of Rule 30, Rosee requested that the matter be submitted to the Committee of Arbitration of the Board of Trade of the City of Chicago.

It was during the arbitration that those persons who were members and officers of the Board of Trade of the City of Chicago were given an opportunity to settle their grudge against Rosee. Under its purported rules, Rosee was afforded a so-called trial without opportunity of

counsel or presentation of witnesses. The following are but highlights of the arbitration proceedings:

(a) It was represented to Rosee that the original records relating to his account with Baggot and Morrison which he had requested, would be made available to him at the arbitration hearing, thereby inducing him to submit to arbitration. Baggot and Morrison later refused to produce such records which had been requested. They were not, and have never been, produced. (Arb.Tr., p. 35, 65, 116-126, 175, 187, 270-274)

(b) James Coughlin, a skilled and experienced attorney, was appointed as prosecutor of Morrison's claim against Rosee before the Arbitration Committee and to represent Morrison therein, and at the same time Rosee was denied the right to be represented by counsel at such hearing. The pretext used to authorize Coughlin's appearance was that he was also a member of the Board. (Arb. Tr., p. 134-142)

(c) The Committee of Arbitration refused to afford Rosee the right to subpoena books, records and witnesses in his behalf, and further refused to order certain members of the Board of Trade to appear as witnesses on his behalf. (Arb. Tr., p. 211-213)

(d) The [illegible]mittee of Arbitration received evidence outside [illegible]osee's presence. (Arb. Award, Def. Ex. 7)

(e) The Committee of Arbitration refused to permit Rosee to file a counterclaim against Baggot and Morrison. (Arb. Tr., p. 121-126)

(f) The Committee of Arbitration caused to be entered against Rosee, on or about December 16, 1960, an award in favor of Morrison in the sum of $11,323.78 (Board of Trade Ex. 7, R. 2951; A. 1386).

(g) Rosee's appeal to the Committee of Appeal was summarily denied without affording him an opportunity to adequately prepare or present the same. (Board of Trade Ex. 8, R. 2953; A. 1386).

(h) On or about March 1, 1961, as a result of the proceedings before the Committee of Arbitration, Rosee's rights, privileges and benefits of membership in the Board of Trade were suspended, this fact to be published among all members of the Board of Trade, in every State of the Union and all over the world. (Board of Trade Exs. 9 and 10; R. 2954; A. 1387).

The instant litigation was commenced in 1963 in the Circuit Court of Cook County against various defendants, including certain federal officials employed by the Commodity Exchange Authority. The case was removed to the United States District Court for the Northern District of Illinois, and after years of litigation, summary judgment was entered in favor of the federal officials and the case remanded to state court. (It should be noted that in an order dated June 28, 1976, District Judge Hubert Will amended his opinion on the basis of newly discovered evidence, the judge holding that "the Rosee deficits referred to in this Court's opinion were contained in a document tendered by the government which this Court is now satisfied and finds to be false and fraudulent." The Appellate Court ignored this order.)

On remand, the case was tried before the Judge Nathan Cohen wherein, after an extensive trial covering over 3,000 pages of transcript, judgment was entered in plaintiff's favor. The evidence included substantial testimony demonstrating the foregoing facts regarding the arbitration proceedings. While petitioner recognizes that the purpose of this Petition is not to restate all of the additional evidence adduced at trial, the third issue raised herein compels a capsulized and limited discussion of that data. By no means does this Petition set forth even a substantial portion of the evidence considered by Judge Cohen.

A logical starting point relates to the business conditions at the clearing firm of Baggot and Morrison. The dire straits of this firm clearly provide motive for the fraudulent dealings with the plaintiff. As evidenced by the testimony of defendant Haywood, Baggot & Morrison was desperately in need of money in the fall of 1959 in order to provide the necessary margins for its house account and in order to maintain the required level of funds necessary to allow all customers to close out their accounts with full payment of their equities in the firm (R. 346; A. 392-393).

Plaintiff was a trusting customer who rarely checked his true equity in the books of Baggot and Morrison. He provided an excellent target for the fraudulent plan enacted by the defendants. As early as the spring of 1958, Baggot & Morrison sustained serious losses and considered Rosee a trusting customer who rarely checked his true equity on the books of Baggot and Morrison, a source of illegal revenue. (R. 2924-2926; A. 1371-1372)

There is no question that Baggot and Morrison was often far short of the money required to be held to margin the house and customers' trades. Haywood testified that employees of Baggot and Morrison traded without using their own money to back up their trades and whatever losses from the trading "were taken from the customers' segregated funds." (R. 2189-2190; A. 1047).

Both in Haywood's testimony and in Plaintiff's Exhibit 72, a CEA Audit Report, it was shown that Baggot and Morrison withdrew money from the customer's segregated funds account and used it for house trades.

In fact, the firm of Baggot and Morrison was continually undersegregated during several continuous periods,

including March 1959 through April 9, 1959, as evidenced by the testimony of Haywood in reference to Plaintiff's Exhibit 73, another CEA document. (R. 2471; A. 1190). In short, the evidence showed that Baggot and Morrison had misappropriated customer funds, including those of Bernhard Rosee.

After presentation of extensive evidence, it became clear that Baggot & Morrison was short of funds necessitating the use of customers' funds, particularly on September 17, 1959, which proved to be one of the key dates in this case. The trial court finally terminated plaintiff's proof on this point, noting what was obvious to everyone, that Baggot & Morrison had been underfunded. (R. 2451-2452; A. 1184)

This evidence of under-segregation and the use of plaintiff as a source of desperately needed revenue began a pattern which started with general misuse of customers' funds, continued in a concentrated plan to defraud plaintiff in hopes of gaining financial stability, and culminated in his suspension and the sale of his membership on the Board of Trade.

The flagrant violations of the Rules and Regulations promulgated under Commodities Exchange Act, its regulations and of basic fair business practice finally influenced the CEA to impose sanction on Baggot & Morrison.

The evidence showed that not only in the arbitration proceedings, but at trial as well, defendants failed to produce the very critical records required by law to be kept to substantiate the alleged deficits attributed to plaintiff. Segmented records which were produced often conflicted with government reports and other Baggot &

Morrison records. Deliberate concealment, destruction, and alteration of records in this case was clear and convincing evidence of fraud. The Commodity Exchange Act [title 7, sec. 1 *et seq.*, U.S.C.] authorizes the promulgation of Rules and Regulations. Under section 1.31 of those Rules and Regulations, which was in force at the time in question, Baggot and Morrison was required to keep its records for five (5) years.

Plaintiff's suit was filed soon after the Arbitration proceedings, and in any event, well within that period, and the case has never been closed. Therefore, defendants at all times knew the importance of *safeguarding* these critical records and their continuous failure to produce them leads to the presumption that they were extremely damaging.

Other statutory requirements pertaining to records to be kept by futures commission merchants such as Baggot and Morrison include Section 1.32: "Segregated Account" and Section 1.35: "Records of Cash Commodity and Futures Transactions."

Throughout this seventeen-year fight, the script has always been the same. Plaintiff has continuously requested and demanded the original records which underlie the manufactured compilations submitted by defendants at every level of these proceedings. He has been frustrated at every level to the point of virtual open defiance to an order by the trial judge. The conclusion to be drawn from this failure on the part of defendants to produce these critical records is undeniable. Plaintiff's claim during the Arbitration proceedings to the present that the records would clear his name is irrefutable.

One of the most important records never produced were the daily segregation statements. These records

have been the subject of concealment throughout the plaintiff's struggle for justice notwithstanding the assurances of Mr. Morrison of their availability in his deposition of October 27, 1970.

It is not contested that the daily segregation statements show the amount of money required to be held by the clearing firm (Baggot and Morrison) in order to pay off each customer at the close of each day's business in the event payment was demanded. The evidence showed that actual payment was not possible because Baggot and Morrison was continuously undersegregated. The records would have shown each person's position; defendant Haywood so testified. (R. 346; A. 392-393)

It cannot be seriously contended that the missing daily segregation records would not have shed light on the issues raised in this case. Defendant Haywood himself referred to the daily segregation statements as "very important". (R. 385-386; A. 408). These records would have further substantiated plaintiff's evidence of the undersegregation at Baggot and Morrison and could have conclusively shown that Baggot and Morrison was required to put up margins far in excess of what money they had on deposit in the customer segregated funds account, thereby establishing wrongful use of plaintiff's funds. More importantly, the daily segregation records would have established Rosee's true position in Baggot and Morrison day by day. It is inconceivable that over 70,000 daily segregation statements would suddenly disappear from the Board of Trade storeroom.

Judge Cohen recognized the importance of the missing daily segregation statements and witnessed throughout the trial the difficulties encountered in establishing the

correct positions of plaintiff due to the scanty and often fraudulent records that were produced (R. 2388-2389; A. 1153-1154).

Purchase and Sales slips were another type of record which Baggot and Morrison was required to keep in the course of its business. Purchase and Sales slips were made up for each trader whenever an open position was to be closed. After an open posittion was closed, or the contract of purchase or sale was finalized, the Purchase and Sales slip was prepared to show whether there had been a profit or loss on that particular transaction. The profit or loss of trades made by plaintiff and those wrongfully claimed to have been made by plaintiff is, of course, basic to this action.

Again, the evidence of concealment and alteration of records was overwhelming. Purchase and Sales slips were kept in a looseleaf fashion and, after the trader received his copy, Baggot and Morrison had a permanent numbered copy for their records. However, defendant Haywood confessed to the removal of pages (Nos. 864-900) on or about December 28, 1959 from a Purchase and Sales book which was to remain as Baggot and Morrison's permanent record. Haywood repeated the removal process on several Baggot and Morrison Purchase and Sales books, all allegedly in an effort to save space. Later, the ridiculousness of the explanation became apparent during cross-examination. It was then established that through all his efforts Haywood saved approximately six inches of space in an 8'x15' storeroom (R. 1527-1528; A. 783).

Worksheets and position cards were records kept by Baggot and Morrison in order to record changes in their traders' open positions. The worksheet was designed to record the actual positions. The worksheet was designed to record the actual daily transactions and the opening

position for the day at the top and the subsequent closing position for the day at the bottom.

All the worksheets supplied by Baggot and Morrison were also prepared a few days prior to the October 12, 1960 arbitration hearing and they were self-manufactured because Baggot and Morrison had on their books 140 accounts (R. 187; A. 346), and none of the worksheets showed more than approximately 60-65 customers. Therefore, approximately 75-80 accounts are missing.

Notwithstanding the defendants' manipulation of the records, indications of their fraud filtered through in many instances in the records which were produced. For example, discrepancies between the worksheet and the position cards received by plaintiff clearly showed the fraudulent treatment of his account and the intention of defendants to present what was the true position to the plaintiff while fraudulently altering other records as to his position through the entries on their worksheet.

In short, the evidence showed beyond a doubt that defendants altered, concealed, lost or destroyed the records which would determine one way or the other just what they claim plaintiff's position was which led to his loss of membership in the Chicago Board of Trade, and the only definitive method by which plaintiff could determine his true position.

It should also be noted that since the Appellate Court's decision, further proceedings were commenced by petitioner under Section 72 of the Illinois Civil Practice Act to re-open the case for consideration of newly-discovered evidence which had been fraudulently concealed by the defendants and in view of forged documents which were used to take his membership away which deprived him of his means of livelihood and forced him to go on public

welfare. For this Court's benefit, a portion of the brief which was subsequently filed in the Appellate Court arising out of the Section 72 proceedings is submitted herewith as Appendix "B", setting forth these additional facts and evidence. At the present time, this matter is pending before the Illinois Appellate Court.

Moreover, on May 17, 1977 and June 21, 1977, in further proceeding in the trial court, Judge Nathan Cohen ordered the Board of Trade to produce certain records which would exonerate petitioner once and for all. The records have not been produced to date.

FINDINGS BY THE TRIAL JUDGE

The trial court recognized the situation created by defendants' concealment and alteration of the records. It became clear that the material original documents were not produced at trial and that within those records which were submitted serious inconsistencies existed exposing the fraud. By the end of the case, the defendants' fraud on the plaintiff was shockingly clear. The trial had been necessarily long because defendants suppressed those records which would have effectively determined the underlying issues. There was only one conclusion possible and this was derived for the most part from the records or lack of them in this case. The trial court's comments are noteworthy (R. 3973):

> I have analyzed the issues. The gentlemen you represent were thoroughly dishonest. They secreted records. They suppressed records. They altered records. That is just as clear as anything that ever happened. There is nothing that you or anybody else can say to change the record in this case and it's based upon the records that I will make my ruling.

The Appellate Court ignored these findings.

FINDINGS OF THE APPELLATE COURT

In reversing the judgment of the trial court, the Appellate Court held that:

1. The litigation before the trial court was concerned with the identical factual situation which was considered by the Arbitration Committee of the Board of Trade; *i.e.*, the basic factual issues in both proceedings centered on the alleged fraudulent manipulations of petitioner's accounts and records in possession of Baggot and Morrison so as to create a fabricated and false indebtedness for petitioner to that firm.
2. The Arbitration Committee of the Board of Trade and Board officials were not guilty of any "conspiracy, partiality or other misconduct."
3. Baggot, Morrison and Haywood did not obtain the arbitration award by fraudulent means (a finding totally contrary to that made by the trial judge).
4. Since (in the Appellate Court's opinion) the arbitration award against petitioner was not obtained by fraudulent means, the arbitration proceedings and award were dispositive of plaintiff's claims. "Under the circumstances," stated the Appellate Court, "neither the trial court nor this court has the authority to make any disposition of the rights of plaintiff and Morrison other than that reached in the award issue by the Committee of Arbitration and duly affirmed by the Committee of Appeals."

With respect to Baggot and Haywood, who were not parties to the arbitration proceeding, the Appellate Court found—contrary to overwhelming evidence and the trial

judge's findings of fact—that "neither Baggot nor Haywood committed fraud of any kind or participated in a conspiracy which would serve as a proper basis for liability to plaintiff." In so doing, the Court disregarded all of the evidence relied upon by the trial court, including the devastating testimony of defendant Haywood, as well as a letter written by Haywood to petitioner, and admitted in evidence in which Haywood asked petitioner's forgiveness for his actions. To appreciate the full impact of the Court's action in this regard, it should be noted that *four years* after the trial, and *four days* prior to oral argument in the Appellate Court, new counsel for the defendant Haywood, who were formerly members of the firm representing the Board of Trade defendants, presented a petition to the Appellate Court, unsupported by affidavits of any medical persons, claiming that the defendant Haywood was insane at the time he gave his testimony at the trial. In May 1974, when Haywood obtained leave of the Appellate Court to adopt the briefs of the co-defendants, no such claim of mental incompetency was made. During the trial of this cause, Haywood was represented by competent counsel, and no claim of mental incompetency was even alleged.

In disregarding Haywood's testimony and the trial judge's findings of fact (which, as previously noted, found the conduct of these defendants so egregious that substantial punitive damages were assessed), the Appellate Court made an incredible and dispositive finding of fact that Haywood was "an unsatisfactory witness not from malicious motives or with fraudulent intention, but simply because of his own mental weakness, probably associated with alcoholism."

ARGUMENT

I.

THE APPELLATE COURT'S DECISION DENIED PETITIONER DUE PROCESS OF LAW BY HOLDING THAT ISSUES DECIDED BY THE ARBITRATION COMMITTEE WERE CONCLUSIVELY RESOLVED AND WERE NOT SUBJECT TO CONTRARY DETERMINATION BY THE TRIAL COURT.

Rule 130 of the Board of Trade provides *inter alia*:

> SUSPENSION FOR DEFAULT—Where a member fails or refuses to perform an exchange contract with or pay obligations arising out of such contracts to another member, *the defaulting member, on complaint of the other member, shall be suspended until the contract is performed or the debt satisfied* . . . If the member alleged to be in default denies the default, he shall be entitled to have the claim arbitrated. . . . [Emphasis Supplied.]

Thus, under Rule 130, the only remedy provided a defaulting member is arbitration, and even then he is suspended or subject to suspension until the claim is arbitrated. This system does not offer a voluntary choice to submit the controversy to arbitration. Quite clearly, petitioner was obliged to engage in mandatory arbitration under Rule 130. In addition, the mandatory nature of the Rule violates Section 7 of the Legislative Act to Incorporate the Board of Trade, adopted by the Illinois Legislature in 1859, providing as follows:

> Section 7. Said corporation may constitute and appoint Committees of Reference and Arbitration, and Committees of Appeals, who shall be governed by such rules and regulations as may be prescribed in the Rules, Regulations, or By-Laws for the settlement of such matters of difference as may be *voluntarily submitted for arbitration* by members of the

> Association, or by other persons not members thereof; . . . [Emphasis supplied.]

In petitioner's view, the Appellate Court's decision denied him due process of law in rejecting the trial court's decision, and deprived petitioner of his constitutional right to litigate his claims, on the stated ground that the arbitration "award should have all the force of any other legal adjudication so as to preclude the parties thereto from further litigation upon the same matters." The error of this finding is four-fold:

First, it is based upon the Appellate Court's determination—finding of fact—that "plaintiff was fairly treated by the Committee of Arbitration as regards Board rules and principles of due process and fundamental fairness. Plaintiff was not prejudiced by failure of the Committee to require mass production of all books, papers and records of every kind", and the Court's further finding of fact that "plaintiff was not deprived of due process in any respect at the arbitration hearings but, on the contrary, the hearings were conducted by the Committee with fairness and impartiality." These findings of fact were made in the face of the trial judge's findings after considering substantial evidence, that the arbitration proceedings were "travesty".

Second, since the plaintiff was compelled to seek arbitration, the resort to arbitration cannot constitutionally be relied upon as a basis for barring judicial redress of the grievances considered by the arbitrators. Third, the use of mandatory arbitration is a violation of the Illinois Act under which the Board of Trade is chartered. Such a violation of the Charter, governing procedure and jurisdiction of the Arbitration Committee, is itself sufficient

to set aside the award granted Morrison in this case. As was stated in *Ryan* v. *Cudahy,* 157 Ill. 108, 119 (1895), a similar case concerning the validity of an arbitration award granted by the Board of Trade:

> [The Arbitration Commitee] may be regarded as a tribunal of limited jurisdiction, and they are bound to proceed in conformity to the rules under which they were selected, and if they failed to conduct the investigation in accordance with the charter and by-laws of the Board of Trade, under which they were appointed, the complainant ought not to be bound by their judgment.

Thus, reliance upon the arbitration proceedings as a bar to common law relief further violated petitioner's right to due process.

Fourth, the arbitration proceedings simply did not provide the rudimentary rights and protection required by due process of law. Records requested by petitioner were not produced, despite promises that they would be. Petitioner was not allowed to be represented by counsel; Morrison was represented by an experienced trial lawyer. The Committee refused to allow petitioner to subpoena books and records needed to refute Morrison's claim. The Committee received evidence outside petitioner's presence. The Committee refused to allow petitioner to file a counterclaim.

Petitioner states that the day the Board of Trade of the City of Chicago, or for that matter *any Board,* was able to expel a member by "kangaroo court" or "Star Chamber" proceedings is over. With the advent of decisions such as *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963) and *Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289 (1973), these so-called voluntary associations, with marriages of convenience with the pertinent governmental agencies, no longer are fiefdoms to themselves. No longer can a member be treated as plaintiff was treated in this case without suffering scrutiny of a court of equity.

Of particular significance to the instant case is *Deakton* v. *L. D. Schreiber & Co.,* 479 F. 2d 529 (7th Cir. 1973), where the Seventh Circuit sustained a cause of action by a member against his board of trade (The Chicago Mercantile Exchange) and other defendants alleging damages as a result of the board's violation of Commodity Exchange Act rules and the rules of the board itself. The following statement of the Court has particular significance [479 F. 2d, at 534]:

> There remains the question whether private damage actions are allowable under the Commodity Exchange Act. As noted earlier, no express provision is contained in the Act. The courts which have considered the question, however, have apparently uniformly concluded that such an action exists. *E.g.,* Booth v. Peavey Co Commodity Services, 430 F.2d 132 (8th Cir. 1970); Johnson v. Arthur Espey, Shearson, Hammill & Co., 341 F.Supp. 764 (S.D. N.Y. 1972); McCurnin v. Kohlmeyer & Co., 340 F.Supp. 1338 (E.D. La. 1972); United Egg Producers v. Bauer Int'l Corp., 311 F.Supp. 1375 (S.D. N.Y. 1970); Anderson v. Francis I. duPont & Co., 291 F.Supp. 705 (D. Minn. 1968); Goodman v. H. Hentz & Co., 265 F.Supp. 440 (N.D. Ill. 1967); 1 Bromberg, Securities Law: § 4.6 (353) (1971). The rationale was stated in *Goodman, supra,* 265 F.Supp. at 447:
>
> "Violation of a legislative enactment by doing a prohibited act makes the actor liable for an invasion of the interest of another if: (1) the intent of the enactment is exclusively or in part to protect the interest of the other as an individual; and (2) the interest invaded is one which the enactment is intended to protect. Restatement, Torts, Section 286."

The purpose of the Commodity Exchange Act has been stated to be "to insure fair practice and honest dealing on the commodity exchanges and to provide a measure of control over those forms of speculative activity which too often demoralize the markets to the injury of producers and consumers and the exchanges themselves." Campbell, "Trading in Futures Under the Commodity Exchange Act," 26 Geo.Wash.L.Rev. 215, 223 (1958). It is a felony under 7 U.S.C. § 13(b) of the Act to manipulate or attempt to manipulate the price of any commodity or to corner or attempt to corner any such commodity. We think the enactment is at least in part intended to protect the interests of the plaintiff-traders in these actions. We therefore hold that a private cause of action exists under the Commodity Exchange Act in favor of the plaintiffs in these actions and that the district court was correct in permitting the plaintiffs to maintain their actions under the Commodity Exchange Act.

It is too clear for discussion that the Record shows that he did not receive a fair hearing before a fair committee, as Due Process requires. *Re Murchison,* 349 U.S. 133, 136. Even the semblance of justice was denied him.

The right to earn a living is protected by the guaranties of the Fourteenth Amendment, and is the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property. It means he can eat. That fundamental right has been denied the plaintiff by the alleged fraud, collision and arbitrariness of the defendants. His sole means of support was taken from him.

A membership on the Board of Trade is also property. *Board of Trade* v. *Johnson,* 264 U. S. 1; *Weaver* v. *Fisher,* 110 Ill. 152, 153.

The right to earn a living is also protected by the Civil Rights Statutes, if one is deprived of that right under color of State action. 28 U. S. C. 1343; 42 U. S. C. 1983.

It therefore becomes essential to determine whether the award of the Arbitration Committee, affirmed by the Committee of Appeals, and leading to the plaintiff's suspension, and endorsed by the Appellate Court contravened fundamental rights.

Section 1 of the Legislative Act incorporating the Chicago Board of Trade limited its right to make Rules, Regulations and By-Laws for its government to those "not contrary to the laws of the land." That term is synonymous with "due process of law." 24 Words & Phrases (Perm. Ed.), p. 427.

Yet for over half a century, the Supreme Court of Illinois in an unbroken line of decisions has refused to interfere with the awards leading to membership suspension of the Committees of the Board of Trade for any reason whatsoever, either in equity or at law. *Board of Trade* v. *Nelson,* 162 Ill. 431, 439; 44 N.E. 743, 745; *Fisher* v. *Board of Trade,* 80 Ill. 85, 87; *Bostedo* v. *Board of Trade,* 227 Ill. 90, 91, 81 N.E. 42, 43; *People ex rel. Page* v. *Board of Trade,* 45 Ill. 112, 116, 118; *People ex rel.* v. *Board of Trade,* 80 Ill. 134, 137; *Baxter* v. *Board of Trade,* 83 Ill. 146, 149; *Sturges* v. *Board of Trade,* 86 Ill. 441, 442; *Pitcher* v. *Board of Trade,* 121 Ill. 412, 419, 421; 13 N. E. 187, 188, 189; *Pacaud* v. *White,* 218 Ill. 138, 147, 148; 75 N. E. 779, 781, 782.

The Appellate Court here adhered to that reasoning.

The reasoning is that by becoming a member, that person had voluntarily submitted himself to the operation of the Legislative Act and the rules adopted pursuant there-

to; that he had thereby made a valid and binding agreement to submit questions in dispute connected with his membership to arbitration, which the courts were powerless to interfere with; and that the Board of Trade having been empowered by its charter to act judicially, its sentence was just as conclusive as that of any other judicial tribunal.

It was even held that if the member had no notice of the hearing and had been unjustly suspended, a court of equity could not reinstate him, because "the action of the Board is final and complete, and if it has erred in that action either on the merits or has acted in a case without jurisdiction, chancery cannot afford a remedy." *Fisher* v. *Board of Trade,* 80 Ill. 85, 87.

So unique are these decisions that they were characterized as "*sui generis.*" *Hill* v. *Mercury Record Corp.,* 26 Ill. App. (2) 350, 361; 168 N.E. (2) 461, 466.

The law has always been in the case of other voluntary associations that their determinations are accepted as conclusive "in the absence of fraud, collusion or arbitrariness." *Gonzales* v. *Roman Catholic Archbishop,* 280 U.S. 1, 16, 17.

It may be conceded that the petition, when he became a member, agreed to abide by *lawful* rules, which were "not contrary to the laws of the land." But so did Baggot and Morrison, and the members of the Committees, and the officers and directors of the Board of Trade. If they had conformed to *lawful* rules, then it may be insisted that the plaintiff should have conformed also; but when they arbitrarily and capriciously violated them, it cannot in justice be claimed that he should be bound by their decision. Rule 187 also required the Arbitration Committee to render its award "according to the laws of the land."

Yet the plaintiff is denied access to the State courts by the Illinois decisions, even though "the laws of the land" were flagrantly violated by those in control.

The Illinois decision overlooked the rule that no matter what the parties agreed to, they cannot oust the courts of their jurisdiction. Regardless of their agreement, parties, in accordance with constitutional guaranties, must have available to them at some point an impartial look by an impartial court at an award made through arbitration, which, they may claim, denies them substantial rights because of fraud, collusion or arbitrariness.

They cannot under those circumstances control, limit, waive, or bargain away all judicial remedies, because such agreements are contrary to public policy. *McCullough* v. *Church-Mitchell Const. Co.,* 71 F. (2) 17, 21, C. A. 8; *Guaranty Trust Co.* v. *Green Cove Railroad,* 139 U.S. 137, 142, 143; 6 A Corbin on Contracts (1962) p. 386, sec 1432.

This is particularly true of compulsory arbitration, which is what Rule 130 really provides. *Mengel* v. *Nashville etc. Union,* 221 F. (2) 644, 647, C. A. 6; *Chas. Wolff Packing Co.* v. *Court of Indust. Relations,* 262 U. S. 522, 544; *Dorchy* v. *Kansas,* 264 U. S. 286; *Re Smith,* 381 Pa. 223, 230; 112 Atl. (2) 625. Compare *Cocalis* v. *Nazlides,* 308 Ill. 152, 158; 139 N.E. 95, 98 (still defending at p. 157 the Board of Trade decisions as an exception to the rule).

Courts of equity have traditionally entertained jurisdiction to restrain the enforcement of arbitration awards in cases of fraud, corruption or where it would be against conscience to enforce them. 6 C. J. S. p. 256, sec. 109; 6 A Corbin on Contracts (1962) p. 417, sec. 1439.

The history of the United States Supreme Court has been one of ever increasing opposition to the concentration of uncontrolled power in the hands of those in control. It has repeatedly taken cognizance of the unfortunate consequences that ensue when those in control are immunized from attack because of their misconduct.

The legal obligation or duty of fairness and impartiality was *implied* in the Railway Labor Act. *Steele* v. *L. & N. R. Co.*, 323 U. S. 210, 213. Otherwise, the Court said, the minority would be left with no means to protect their interests, or indeed, their right to earn a livelihood, and constitutional questions would have to be decided.

Mr. Justice Murphy's concurring opinion, 323 U. S. 192, 208, pointed up the situation clearly when he said:

> "While such a union is essentially a *private* organization, its power to represent and bind all members of a class or craft is derived solely from Congress. * * * But it cannot be assumed that Congress meant to authorize the representative to act so as to ignore rights guaranteed by the Constitution. Otherwise the Act would bear the stigma of unconstitutionality * * *." (Italics ours.)

This view applies with equal force here. By the power of the Board of Trade to make rules and to admit or expel such persons as they may see fit, in manner to be prescribed by the rules, it cannot be assumed that the Illinois legislature meant them, that is, those in control, to act so as to ignore rights guaranteed by the Constitution, or as the Act itself says, "not contrary to the laws of the land".

The rule we contend for, and which the Supreme Court of Illinois seems to have overlooked, was applied to the "final and binding clauses" contained in arbitration contracts between management and union pursuant to the Railway

Labor Act. System Boards of Adjustment are created by *private* contract making their awards "final and binding". The federal courts, including this Court, have held that such contracts cannot make the award of such Boards immune from judicial examination where arbitrary and capricious action, or bias and prejudice of the arbitrators, were alleged. *Arnold* v. *United Air Lines*, 296 F. (2) 191, 193, C. A. 7; *Ellerd* v. *Southern Pac. R. Co.*, 241 F. (2) 541, 544, C. A. 7; *Edward* v. *Capital Air Lines*, 176 F. (2) 755, 760, 761; App. D. C.; cert. den. 338 U.S. 855.

The Illinois decisions not only deny due process; they deny equal protection of the laws. Section 8 of the Legislative Act incorporating the Chicago Board of Trade permits the filing of the award in the Circuit Court with all the force and effect of a judgment and authorizes the issuance of an execution thereon. The alleged debtor's assets are subject to sale; but the Illinois decisions deny him access to the same court to resist the same, even though his constitutional guaranties have been sacrificed in the process.

The Illinois decisions have allowed the unfortunate victim to be tried by an agency clothed with power so uncontrolled and so devoid of standards or guides (compare Uniform Arbitration Act, 1 Ill. Rev. Stat. 1961, Ch. 10, Secs. 105-115), that it is in effect an agency with the power of life or death over the economic existence of the person claimed against, with his hands tied behind him.

Thus, the highest court of the State of Illinois says in effect: "Yes, it may be that the hand-picked Committees of the Board of Trade arbitrarily deprived a member of his sole means of support, his property, and his reputation, but the courts of Illinois can do nothing about it." Such a rule of law, by denying all relief from arbitrary power and discriminatory action, implicitly sanctions them:

and deprivations of interests that are part of a man's life, liberty and property, when based on such grounds, contravene Due Process. See Mr. Justice Frankfurter's dissenting opinion, *Barsky* v. *Board of Regents of N. Y.*, 347 U.S. 442, 469; *Trax* v. *Raich*, 239 U. S. 33, 38.

It has been the constant ruling of the United States Supreme Court that the action of the State to which the Fourteenth Amendment has reference, includes action of the State courts and State judicial officials. The federal guaranty of Due Process extends to State action through its judicial as well as through its legislative, executive or administrative branches. *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673; 680; *Shelley* v. *Kraemer*, 334 U. S. 1, 14, 15, 17, 18; *Barrows* v. *Jackson*, 346 U. S. 249, 254.

In the *Brinkerhoff-Faris Co.* case, p. 682, the Court said:

> "Whether acting through its judiciary or through its legislative, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

The State of Illinois, by the actions of its legislature and its judiciary, has created a corporation with powers that are repugnant to the Federal Constitution. That cannot be done. *Phillips Petroleum Co.* v. *Jenkins*, 297 U.S. 629, 634.

The fact that this action was not instituted in the State court and a decision of the Illinois Supreme Court secured first, does not militate against federal jurisdiction. *Doud* v. *Hodge*, 350 U. S. 485, 487.

The United States Supreme Court said many years ago that "the nature and theory of our institutions of government * * * do not mean to leave room for the play and

action of purely personal and arbitrary power. * * * For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369, 370.

Clearly, the use of the arbitration proceeding as a basis for denying petitioner a right of action constituted a denial of due process.

II.

PETITIONER WAS DENIED DUE PROCESS OF LAW BY THE APPELLATE COURT'S SUBSTITUTION OF ITS FINDINGS OF FACT FOR THOSE OF THE TRIAL JUDGE.

The extent to which the Appellate Court disregarded the findings of fact reached by the trial judge based as they were on substantial evidence, constituted a clear violation of petitioner's right to trial and violated the Due Process clause of the Fourteenth Amendment.

This case was tried by an experienced, able and thorough irial judge who personally heard all the testimony and reviewed all the exhibits. The Supreme Court of Illinois, in speaking of findings of a master in chancery, has stated the universal rule in *Horan* v. *Blowitz*, 13 Ill. 2d 126, 148 N.E. 2d 445, 449 (1958):

> "Although the testimony presented conflicted in many details, the master spent considerable time in observing the witnesses and in preparing the findings which were approved by the chancellor. We have long held that such findings are entitled to great consideration and will be disturbed only if manifestly against the weight of the evidence. *Finely* v. *Filter*, 403 Ill. 372; *Hopkins* v. *Austin State Bank*, 410 Ill. 67."

Plaintiff submits that if such weight is to be given the findings of a master in chancery, then surely the findings of an experienced trial judge are to be given equal weight. As the proceedings below involved countless numbers of business records, often with several witnesses testifying extensively on each such record, it is proper that the superior position of the trial judge be given substantial consideration upon review where it is alleged that the findings are against the manifest weight of the evidence.

It is elementary that where, as here, the validity of business records is disputed, the issue will be determined by the testimony of various witnesses.

It would be a hollow right, indeed, to suggest that a party may have redress to the courts to vindicate his rights, but that the findings therein made can be flagrantly disregarded in favor of the opposing party. The extent to which this occurred in the instant case can only be fully presented in full briefs before this Honorable Court.

CONCLUSION

It is respectfully submitted that, for the reasons herein stated, a Writ of Certiorari should issue to the Supreme and Appellate Courts of Illinois and that this case should be reviewed in full by this Honorable Court.

Respectfully submitted,

WILLIAM J. HARTE, LTD.
111 West Washington Street
Chicago, Illinois 60602
Attorney for Plaintiff-Petitioner.